LORINDA L. HULSMAN

IBLA 72-463 Decided September 26, 1973

Appeal from issuance of a trust patent for an Indian allotment within a national forest.

Remanded.

Indian Allotments on Public Domain: Generally

An application for an Indian allotment within a national forest under section 31 of the Act of June 25, 1910, is properly rejected as to a portion of the land where the Department of Agriculture has not determined that under 25 U.S.C. § 337 (1970) and 43 CFR Subpart 2533 said portion is more valuable for agricultural and grazing than for the timber found thereon.

Patents of Public Lands: Reservations ! ! Indian Allotments on Public Domain: Generally

Where roads, trails, bridges, and other improvements necessary for the proper and economical administration, protection, and development of the national forest have been actually constructed and are being maintained upon public lands of the United States and the lands are thereafter disposed of under any of the public land laws, the patent should except such portion thereof as is so devoted to public purposes.

APPEARANCES: Lorinda L. Hulsman, pro se.

OPINION BY MR. GOSS

Lorinda L. Hulsman has appealed to the Secretary of the Interior, through the Bureau of Indian Affairs, Sacramento, California, from the partial rejection of her Indian allotment application (S 4942) under section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1970), for 160 acres within a national forest. Section 31 reads:

> Sec. 31. That the Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws * * * to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided. (Emphasis added.)

Appellant filed an application dated October 30, 1962, for an allotment of 160 acres within the Lassen National Forest, located within sec. 22 and sec. 23, T. 27 N., R. 2 E., M.D.M., California. The applicant alleged settlement on the applied for land and valuable permanent improvements consisting of "a five ! room pumice brick home, a large barn together with improved roads and fences."

Upon investigation the Forest Service, U. S. Department of Agriculture, determined that an area of 85 acres is more valuable for agriculture or grazing than for the timber found thereon and recommended that a patent issue. No such determination as to timber value was made for the remaining 75 acres. The Forest Service found that only the recommended 85 acres had actually been occupied and used over a long period of time, and that applicant had used the 75 acres under a grazing permit and for an access road which could be continued by a special use permit. That area also contained Forest Service improvements including a road, bridge, and public campground. In addition, the Forest Service noted that a unique geological formation, a part of the Black Rock, was located in this area which should be kept for public use and enjoyment.

A trust patent was issued for the 85 acres by the California State Office on March 17, 1972, Trust Patent No. 04-72-0102, by implication denying patent of the remaining 75 acres. 1/ The patent issued includes certain reservations, including an easement of Mill Creek and 10 feet on each side for general access and fish culture, and a 10! foot easement for the existing Mill Creek Trail No. 4 E 10.2.

Appellant contends that she should be granted the full 160 acres for which she made application. She also asserts that if the patent is issued as stated the easement "would take off a corner of my property between the barn, the creek and the house, which is presently enclosed by fence, and which is necessary for me to have in caring for my stock." Appellant also states that she is not willing to grant the easement for Mill Creek and, as to Mill Creek Trail, she would only grant an easement the width of the present trail. The easement would be restricted to use by horses and foot traffic because of damage to appellant's livestock by trail bikes.

Under section 31 the Secretary of Agriculture must determine whether "the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon." Beverly Sharon Letchworth, 12 IBLA 344 (1973). The Bureau of Land Management must accept the determination of the Department of Agriculture and then inform the applicant thereof. Id. For lands which are not more valuable for timber found thereon, the Secretary of the Interior has discretion as to whether the allotment should be made. 43 CFR 2533.2. 2/ Curtis D. Peters, 13 IBLA 4 (1973).

1/ It seems clear the Bureau of Land Management considers that its action in limiting the patent to 85 acres is a denial of patent as to the remaining 75 acres. In its letter of June 16, 1972, transmitting the appeal, the State Office explains that the appeal is "based on less than 160 acres being in the patent." While the Board could have remanded the matter for a more formal ruling by the Bureau, the appellant's application has been pending since 1962. It is in her interest and that of the taxpayer for the case to be processed without unnecessary procedures.

2/ § 2533.2 Approval.

(a) Should the Secretary of Agriculture decide that the land applied for, or any part of it, is chiefly valuable for the timber found thereon, he will transmit the application to the Secretary of the Interior and inform him of his decision in the matter. The Secretary of the Interior will cause the applicant to be informed of the action of the Secretary of Agriculture.

The Bureau of Land Management followed the recommendation of the Department of Agriculture in limiting the trust patent to 85 acres. For the remaining 75 acres the record does not show whether the required classification has been made by the Department of Agriculture as to whether the area is more valuable for agricultural or grazing purposes than for the timber thereon. Miller v. United States, N.D. Cal. No. 70 2328 WTS (1973). The case is therefore remanded in order that the State Office may request the Secretary of Agriculture to make the required determination.

Under 25 U.S.C. §§ 331, 334, 337 (1970). an allotment to a single Indian may not exceed 80 acres of agricultural land or 160 acres of grazing land. It would appear that since the appellant has already received 85 acres, a determination has been made that despite the small orchard the land concerned is primarily valuable for grazing rather than agricultural purposes.

As to the occupancy required under section 337, the Department of Agriculture has concluded that, contrary to appellant's claim, the 75 acres had not been occupied by appellant. 3/ While final determination of occupancy is made by the Department of the Interior, the occupancy issue need not be considered until the Secretary of Agriculture has first determined that the parcel is more valuable for agricultural or grazing purposes than for the timber thereon. Junior Walter Daugherty, 7 IBLA 291, 295 (1972).

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fn. 2 (Cont'd.)

(b) In case the land is found to be chiefly valuable for agriculture or grazing, the Secretary of Agriculture will note that fact on the application and forward it to the Commissioner of Indian Affairs.

(c) The application must be filed with the manager of the land office for the district in which the land applied for is located. He will then forward the case to the Bureau of Indian Affairs for consideration. If the Commissioner of Indian Affairs approves the application, he will transmit it to the Bureau of Land Management for issuance of a trust patent.

3/ The report by the Forest Service states that the 75!acre portion "has not been lawfully occupied by the claimant." Yet the report notes that, "The applicant earns a living raising livestock. She has a permit to run cattle on the Lassen National Forest in the range allotment that surrounds her headquarters !! the same area applied for as an Indian allotment." Elsewhere the report states., "all of this is area presently used by applicant's livestock under grazing permit."

With regard to the easements included in the trust patent, where roads, trails, bridges and other improvements necessary for the proper and economical administration, protection, and development of the national forests, have been actually constructed and are being maintained upon public lands of the United States, and the lands are thereafter disposed of under any of the public land laws, the patent should except such portion thereof as is so devoted to public purposes. Departmental Instructions, 44 L.D. 513 (1916). Under 25 U.S.C. § 323 (1970), the Department is empowered to reserve easements in the interest of the public generally. See also Solicitor's Opinion M-36500 (,May 5, 1958). The easements reserved were requested by the Department of Agriculture, and the record supports the exercise of discretion by the California State Office in including the easements in the patent, However, the State Office is instructed to review the location of the trail to determine if it could be relocated to be less of an interference with the area patented. As to appellant's difficulties with trail bikes, if it appears to be in the public interest then the California State Office ! ! after consultation with the Department of Agriculture ! ! could amend the trust patent to specify that the easements are not reserved for use by private vehicles. If patent is issued for additional acreage, then the public camp ground, the bridge, Black Rock and the appropriate easements could be reserved.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the matter is remanded for appropriate action.

Joseph W. Goss
Member

I concur:

Edward W. Stuebing
Member

SEPARATE OPINION BY MRS. THOMPSON

While I agree this case must be remanded to the Bureau of Land Management for further consideration, I believe discussion into some of the matters is premature at this point. What we have before us is an improperly adjudicated case and a protest by Mrs. Hulsman concerning her patent. Although Mrs. Hulsman was issued a patent for 85 of the 160 acres for which she applied as an Indian allotment within a national forest, no decision was issued nor was notice given to her of any reasons for not issuing the patent for the full 160 acres. After a Bureau of Indian Affairs (BIA) official mailed her the patent, she submitted a letter to the BIA dated April 11, 1972, indicating "I hereby appeal" the decision of the BIA issuing the patent for only 85 acres. She also objected to certain easements in the patent. The BIA forwarded her letter to the State Director, Bureau of Land Management (BLM),indicating it was "an appeal to the Forest Service, Department of Agriculture." BLM then forwarded the case to this Board.

Before the patent issued, BLM should have issued a decision giving notice of the reasons for disallowance of a portion of the lands in her application. From the field reports in the record, the majority implies the reasons for the action taken. Neither an appellant nor this reviewing Board should have to imply the reasons for adjudicative action. Essentially, Mrs. Hulsman's letter was a protest and a request for relief. The fact she used the word "appeal" does not automatically confer jurisdiction upon this Board. This Board should not act as the initial adjudicator on her protest. This should be done by BLM. The proper course of action here is to dismiss the appeal as having been erroneously sent to this Board and remand the case to BLM to adjudicate her protest properly. Only general instructions to BLM are necessary, including referral to the Department of Agriculture for its further determination. After proper adjudication, BLM should issue a decision setting forth the reasons for the action taken therein. If adverse to Mrs. Hulsman she would then have the right to appeal to this Board fully informed of the reasons for the action.

Joan B. Thompson
Member